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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DR. KATHLEEN JOHNSON WU,
Petitioner,
v.
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate; DR. E. ROGER SAYERS, individually and in his official capacity; DR. JAMES G. TAAFFE, in his official capacity; DR. RICHARD PECK; DR. JAMES YARBROUGH, in his official capacity; DR. MAX HOCUTT, individually and in his official capacity; DR. JOHN FORMBY; and DR. BILLY HELMS, in his official capacity,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public official's actions, which had not been found to be in violation of Title VII or the First Amendment of the United States Constitution under clearly established law at the time the actions were taken, are protected by the doctrine of qualified immunity from claims pursuant to 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING IN THE ELEVENTH CIRCUIT COURT OF APPEALS

Plaintiffs-appellants in the Eleventh Circuit Court of Appeals were Dr. Kathleen Johnson Wu and Dr. Hsiu Kwang Wu. Defendants-appellees were The Board of Trustees of The University of Alabama, a body corporate[1] ; Dr. E. Roger Sayers, individually and in his official capacity as President of the University of Alabama; Dr. James G. Taaffe, in his official capacity as Academic Vice-President of the University of Alabama; Dr. Richard Peck, individually; Dr. James Yarbrough, in his official capacity as Dean of the College of Arts and Sciences of the University of Alabama; Dr. Max Hocutt, individually and in his official capacity as chairperson of the Department of Philosophy of the University of Alabama; Dr. John Formby, individually; and Dr. Billy Helms, in his official capacity as head of the Department of Finance, Economics, and Legal Studies of the University of Alabama.

[1] The Board of Trustees of The University of Alabama is a public corporation and has no parent companies or nonwholly-owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING IN THE ELEVENTH CIRCUIT COURT OF APPEALS	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW	1
RELEVANT CONSTITUTIONAL AND STAUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
A. History of the Litigation	5
B. Facts Related to the JNOV Granted by the Trial Court	7
ARGUMENT	9
A. The Acts that the Jury Found Dr. Hocutt Had Committed in Retaliation Against Kathleen Wu Are Protected Under the Doctrine of Qualified Immunity	9
B. The District Court's Grant of JNOV Was Also Based on Other Grounds, Not Challenged Here	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES

Agosto-De-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989) 11
Anderson v. Creighton, 483 U.S. 635 (1987) 9, 10, 12, 14
Bart v. Telford, 677 F.2d 622 (7th Cir. 1982) 13
Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983) 11
Collins v. Illinois, 830 F.2d 692 (7th Cir. 1987) 11
Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir. 1984) 11
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9, 10
Harris v. Forklift System, Inc., _____ U.S. _____, 114 S. Ct. 367 (1993) 13
Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) 13
Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) 11
Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977) 11
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) .. 13
Parke v. Raley, _____ U.S. _____, 113 S. Ct. 517 (1992) 16
Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987) 11
Procunier v. Martinez, 416 U.S. 396 (1974) 14
Rodriguez v. Bd. of Educ., 620 F.2d 362 (2nd Cir. 1980) 11
Rutan v. Republican Party, 497 U.S. 62 (1990) 12
Rutan v. Republican Party, 868 F.2d 943 (7th Cir. 1989) 12

St. John v. Employment Development Dept., 642 F.2d 273 (9th Cir. 1981) 11
Stanley v. Georgia, 394 U.S. 557 (1969) 14
Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990) 11
Thomas v. Collins, 323 U.S. 516 (1945) 14
Whitney v. California, 274 U.S. 357 (1927) 14
Wu v. Board of Trustees, 490 U.S. 1006 (1989) 5
Wu. v. Board of Trustees, CV-87-G-0501-W (N.D. Ala. Feb. 22, 1991) 1, 6, 8
Wu v. Thomas, 11 F.3d 169 (11th Cir. 1993) 1,6
Wu v. Thomas, 996 F.2d 271 (11th Cir. 1993) 1,6
Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989), *reh'g denied*, 871 F.2d 122 (11th Cir. 1989) 5
Wu v. Thomas, 847 F.2d 1480 (11th Cir. 1988) 5
Wu v. Thomas, CV-87-G-0501-W (N.D. Ala. Oct. 20, 1987) 5
Wu v. Thomas, CV-84-G-2159-W (N.D. Ala. Oct. 24., 1986) 5

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 2000e-2 ..... *passim*

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the District Court for the Northern District of Alabama, entered February 22, 1991, is reprinted at page 31a of plaintiff's Petition for Writ of Certiorari. The Eleventh Circuit Court of Appeals' affirmance of this opinion appears at 996 F.2d 271 (11th Cir. 1993), and its denial of reconsideration or rehearing *en banc* appears at 11 F.3d 169 (11th Cir. 1993).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . 42 U.S.C. § 1983.

2. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a).

3. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances. U.S. Const. amend. I.

STATEMENT OF THE CASE

A. History of the Litigation

In 1985, Kathleen Wu filed suit against the University of Alabama and certain of its officials. She alleged that she was a victim of sex discrimination, as manifested by the failure of her attempts to be promoted to the rank of full professor, her relative lower pay, and her general treatment by the defendants. Her claims were based on Title VII, the Equal Pay Act, and the Fourteenth Amendment.

The United States District Court for the Northern District of Alabama, after a trial on the merits, found against Kathleen Wu on all issues. *Wu v. Thomas*, CV-84-G-2159-W (N.D. Ala. Oct. 24, 1986). She appealed to the Eleventh Circuit Court of Appeals, which affirmed in all respects. *Wu v. Thomas*, 847 F.2d 1480 (11th Cir. 1988). Plaintiff's petition for certiorari was denied. *Wu v. Board of Trustees*, 490 U.S. 1006 (1989).

In 1987, Kathleen Wu and her husband H.K. Wu filed this action, in which they claimed that they had suffered retaliation for Kathleen Wu's earlier sex discrimination claims. The court granted defendants summary judgment, *Wu v. Thomas*, CV-87-G-0501-W (N.D. Ala., Oct. 20, 1987), which was vacated and the case remanded by the Eleventh Circuit. *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), *reh'g denied*, 871 F.2d 122 (11th Cir. 1989). The Eleventh Circuit noted that plaintiffs were seeking to enforce Title VII through the operation of section 1983. 863 F.2d at 1549 n.9.

Upon remand, because the case predated the Civil Rights Act of 1991, the trial court bifurcated the trial into jury and non-jury issues. The first part of the trial, addressing issues to be submitted to a jury, was held before a jury and lasted thirteen days. The jury's verdict, as reflected in written jury interrogatories, was in favor of all the individual defendants except for Max Hocutt. The jury cited seven acts that they believed Max Hocutt had committed in retaliation against Kathleen Wu. The trial court judge granted a JNOV in favor of Max Hocutt and against Kathleen Wu, and denied JNOVs in favor of Kathleen and H.K. Wu and against the other individual defendants. *Wu v. Board of Trustees*, CV-87-G-0501-W (N.D. Ala. Feb. 22, 1991).

Plaintiffs appealed to the Eleventh Circuit Court of Appeals seeking review of the trial judge's grant of a JNOV in favor of Max Hocutt and against Kathleen Wu; of the trial judge's refusal to recuse himself; of the trial judge's instructions to the jury removing from their consideration certain of the claims of H.K. Wu; and of the trial judge's denial of plaintiffs' motion to amend their complaint to add Joab Thomas as a defendant. The Eleventh Circuit affirmed the trial court on all counts. *Wu v. Thomas*, 996 F.2d 271 (11th Cir. 1993). Plaintiffs requested a reconsideration or rehearing *en banc*, which was denied by the Eleventh Circuit. *Wu v. Thomas*, 11 F.3d 169 (11th Cir. 1993). Plaintiff now seeks review of the Eleventh Circuit Court of Appeals' affirmance of the trial court's having granted a JNOV in favor of Max Hocutt and against Kathleen Wu.

B. Facts Related to the JNOV Granted by the Trial Court

The jury returned a verdict in favor of Kathleen Wu and against defendant Hocutt, her department chair, and assessed $20,000 in compensatory damages and $60,000 in punitive damages. The district court judge had given the jury a written set of special interrogatories and special verdicts, on which the jury was to indicate whether they believed any retaliatory action had been taken, and if so what that action was. They were instructed to use the back of the page if there was not enough room on the front of the page to list all the acts that they found. After hearing numerous claims involving issues in relation to which Kathleen Wu, allegedly, suffered monetary harm, including salary, raises, reimbursement, and travel, the jury rejected those claims and focused only on seven specific acts that they believed had been retaliatory. The jury found that Hocutt had retaliated against Kathleen Wu in the following ways:

1. He assigned a classroom with inadequate blackboard space.
2. He wrote a list of bankers [sic] dozen ideas to discipline K. Wu.
3. He referred to her classes as dying.
4. Textbook changed after class was set up.
5. Criticism of her lawsuit in front of faculty members at meetings and secretaries.
6. Called her dishonest with no proof.

7. Damaged her reputation as a teacher and person.

Wu v. Board of Trustees, CV-87-G-0501-W, slip op. at 7 (N.D. Ala. Feb. 22, 1991).

In its order granting JNOV, the trial court stated,

> The seven specific acts listed are not contrary to established law. They do not evidence deprival of a constitutionally protected property interest. None of them deprived Dr. Wu of her tenured position or caused a loss of salary. Generally speaking, in each instance Dr. Hocutt was either responding to the dean or answering questions honestly when asked to do so by plaintiff Kathleen Wu or her attorney.

Id. at 7-8.

The court then went on to address each of the seven acts that the jury had cited in support of their verdict in favor of Dr. Kathleen Wu and against Dr. Hocutt. In each case, after a lengthy review of the evidence that had been presented during the trial, the court pointed out why the evidence related to that particular act could not support a judgment against Dr. Hocutt. At the conclusion of this review, the court held "that for the reasons given the motion of Dr. Max Hocutt for judgment notwithstanding the verdict is to be granted, there being no factual basis for the verdict." *Id.* at 13.

ARGUMENT

A. The Acts that the Jury Found Dr. Hocutt Had Committed in Retaliation Against Kathleen Wu Are Protected Under the Doctrine of Qualified Immunity

As one of the grounds for granting a JNOV, the trial court judge found that the seven specific acts listed by the jurors were not contrary to established law. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court established the rule that a government official performing discretionary functions is protected from personal liability based on actions within the scope of his or her position, as long as the actions taken do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This test was later clarified in *Anderson v. Creighton*, 483 U.S. 635 (1987), in which this Court recognized that "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. As the Court explained:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. . . . But if the test of "clearly established law" were to be

> applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Id. at 639.

Thus, in light of *Anderson*, it is not enough simply to say that the *prohibition against retaliation* is "clearly established." Rather, the plaintiff here is required to show that clearly established law prohibits a department chair from assigning classrooms, responding to his dean's request for disciplinary suggestions, informing the dean's office about the status of departmental courses and salary recommendations, attempting to improve the quality of courses in the department, exercising his First Amendment rights, and responding honestly to questions. Obviously, these activities do not rise to the level of "clearly" illegal acts, and plaintiff does not cite anything that would have enabled a "reasonable person" to believe that these acts were violative of Title VII.

Through an over-broad categorization of cases in other circuits, however, plaintiff has attempted to create an illusory conflict among the circuits on this issue. Plaintiff attempts to divide retaliatory acts into only two

wide-ranging groups: those acts causing economic harm and those causing non-economic harm. Then, by citing cases in which a specific form of non-economic harm has been held to be clearly violative of Title VII, plaintiff attempts to extend the reach of that analysis to cover *all* cases involving any type of non-economic harm. The cases cited by plaintiff as supporting the "clear illegality" of non-economic retaliatory acts, however, all involve either an involuntary transfer from one job to another or a distinct change in job duties. *Agosto-De-Feliciano v. Aponte-Roque*, 889 F.2d 1209 (1st Cir. 1989); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Collins v. Illinois*, 830 F.2d 692 (7th Cir. 1987); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987); *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640 (8th Cir. 1983); *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); *St. John v. Employment Development Dept.*, 642 F.2d 273 (9th Cir. 1981); *Rodriguez v. Bd. of Educ.*, 620 F.2d 362 (2nd Cir. 1980); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977).

None of the seven acts cited by the jury, however, even assuming *arguendo* that there was sufficient evidence to support them, begins to approximate a job transfer or a change in job duties. Nowhere did the jury, or the plaintiff, for that matter, suggest that as a result of Max Hocutt's actions, Kathleen Wu ceased to be assigned to teach the same university-level philosophy courses at the University of Alabama that she had been teaching before she first complained about her situation.

By using such a broad level of generality, plaintiff is applying precisely the sort of analysis that the *Anderson* court criticized as improper. Whether *any* act with non-economic consequences has been held to clearly violate Title VII is not the issue; the Court below properly considered whether the seven specific acts cited by the jury met that criterion. Both the trial court and the Eleventh Circuit found they did not.

The only other citation referred to by plaintiff in support of her claim that the acts found by the jury were clearly illegal is a footnote to an opinion issued by this Court in a case arising from the Seventh Circuit and decided *after* all of the acts in the jury's list were supposed to have taken place. *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990). As this Court explained in *Anderson*, for public officials' acts to lose the protection of qualified immunity, "in light of *pre-existing law* the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 *(emphasis added)*. The inquiry focuses on the information possessed by the official *at the time the conduct occurred*. *Id.* at 641. Thus, even if the dictum found in the footnote of *Rutan* could be said clearly to establish the illegality of a trivial act after June 1990, there is no argument that such illegality was clearly established in the Eleventh Circuit at the time the acts listed by the jury are supposed to have been taken.[1]

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[1] Because plaintiff seems to place such stock in this dictum found in *Rutan*, it may be useful to look at the footnote's background. The Supreme Court's footnote cites to a footnote in the Seventh Circuit opinion below. *Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989). The Seventh Circuit footnote, likewise cited to an earlier Seventh Circuit case, *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). In that earlier case, however, the Seventh Circuit had made it quite clear

Although plaintiff seeks to equate Max Hocutt's acts, as found by the jury, with hostile environment sexual harassment by invoking *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift System, Inc.*, _____ U.S. _____, 114 S. Ct. 367 (1993); and *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982), she does not cite to a single case in support of the proposition that the analysis appropriate to sexual harassment cases is interchangeable with that used in retaliation cases. By their nature, sexual harassment cases are extremely fact-specific and do not easily translate into the retaliation area. Moreover, the difference in the elements required to be proven for the two claims highlights the vast differences between the analyses appropriate to the two types of claims.

Finally, the cases cited by plaintiff in support of her proposition, that violations of the First Amendment need not involve financial loss, are entirely inapposite. *Procunier v. Martinez*, 416 U.S. 396 (1974) involved the

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that it was not holding that failure to have a birthday party is actionable under Title VII. In that case the defendant was alleged to have orchestrated a campaign of harassment against the plaintiff, including having held her up to ridicule for bringing a birthday cake for another employee. In commenting on that, the court recognized that such a complaint contained "a certain air of the ridiculous." *Id.* at 625. The court went on to note "even in the field of constitutional torts *de mininis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. . . ." *Id.* Indeed, what the Seventh Circuit Court of Appeals actually did in *Bart v. Telford* was to remand to district court a determination of whether the totality of the "campaign" of harassment had, in fact, reached a threshold of actionability under section 1983.

Procunier v. Martinez, 416 U.S. 396 (1974) involved the permissibility of censoring prison inmates' mail and limiting their contact with attorneys; *Stanley v. Georgia*, 394 U.S. 557 (1969) involved a question of the illegality of possessing obscene materials; *Thomas v. Collins*, 323 U.S. 516 (1945) involved the rights of labor unions to organize workers; and *Whitney v. California*, 274 U.S. 357 (1927) involved the application of criminal statutes to members of the Socialist party. What these cases establish is simply that it is a violation of the First Amendment to abridge the freedom of speech. This analysis simply begs the question posed by *Anderson*. It is the burden of plaintiff to show that the specific way in which free speech was allegedly abridged was clearly illegal.

B. The District Court's Grant of JNOV Was Also Based on Other Grounds, Not Challenged Here

The Court of Appeals based its affirmance on an analysis of Hocutt's right to qualified immunity in the case. The district court had interpreted language in a footnote to the Eleventh Circuit's reversal of its earlier summary judgment order as requiring the trial court to permit plaintiffs to seek damages under section 1983 for the alleged violation of Title VII[2]; for that reason,

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[2] Although the Eleventh Circuit's footnote pointed out that appellants were seeking the additional remedies provided by section 1983, over and above those available under Title VII (this case predates the Civil Rights Act of 1991), that court did not offer any opinion about the correctness of plaintiffs' attempted expansion of section 1983 coverage. The trial court interpreted this footnote as an instruction to grant plaintiffs a jury trial on their Title VII claims against the individual defendants. The issue of whether such an interpretation was correct, in view of the wealth of

qualified immunity became available to defendants. If damages are sought under section 1983, the defenses to 1983 are also applicable.

The Eleventh Circuit Court of Appeals affirmed the district court order in its entirety. As noted earlier, the trial court granted defendants JNOV not only because Dr. Hocutt was protected by the doctrine of qualified immunity, but also because the trial judge found there was "no factual basis for the verdict." For each of the seven acts listed by the jury on their interrogatory forms, the court found as a matter of law that there was no legally sufficient evidentiary basis for the jury's findings. The Eleventh Circuit Court of Appeals did not disturb the district court's finding that Max Hocutt was entitled to a JNOV on more than one basis, and plaintiff has not raised that as an issue in her Petition for Writ of Certiorari.

Even if this Court were to find that qualified immunity was not an appropriate ground for granting the JNOV in favor of Max Hocutt, the trial court's order would still stand, based on the lack of evidence. Plaintiff's Petition asks for review only of the correctness of the qualified immunity defense under the facts presented. It is well-established that for purposes

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precedent in opposition, was raised during oral argument before the Eleventh Circuit, but was not addressed by the Eleventh Circuit in its opinion.

If the Court should grant plaintiff's Writ, respondents respectfully suggest that a meaningful review of this decision cannot be made without including the underlying premise of trial below--the use of 42 U.S.C. § 1983 to enforce Title VII rights--within the scope of the writ.

of judicial economy, the Supreme Court does not address issues not raised in the Petition for Writ of Certiorari. *Parke v. Raley,* _____ U.S. _____, 113 S. Ct. 517, 523 (1992). Thus, even were this Petition granted, and the Eleventh Circuit's reasoning on the issues raised in the Petition reversed, the results of the litigation would not change. The district court's granting of JNOV based on lack of evidence to support the charges has not been questioned by the Eleventh Circuit and is not questioned before this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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